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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TWIN CITY SPORTSERVICE, INC., *et al.*,
Petitioner,

vs.

CHARLES O. FINLEY & COMPANY, INC., *et al.*,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Under the Rule of Reason, may a long-term exclusive contract be found to violate Section 1 of the Sherman Act without examination of the actual competitive impact of the challenged terms?

2. May an attempt to monopolize be found where there is no evidence of either a specific intent to monopolize or a dangerous probability of success, but both are merely presumed by the court from conduct that is not *prima facie* anticompetitive?

3. May damages arising from a contract alleged to restrain trade be awarded automatically without any showing of an antitrust injury or even injury in fact?

PARTIES INVOLVED

The parties to the proceeding in the court below are Twin City Sportservice, Inc. and Sportservice Corporation as Appellants and Charles O. Finley & Company; Charles O. Finley; Shirley M. Finley; Charles O. Finley, Jr.; Paul M. Finley; Sharon Kessling and Kathryn Perlmutter as Appellees.

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George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) 12,13

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Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979)	12
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Weyerhaeuser Co. v. Lyman Lamb Co., 655 F.2d 627 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3743 (U.S. Mar. 2, 1982) (No. 81-1618)	17
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Panel Discussion on H.R. 8349 before Subcomm. of the House of Rep. Comm. on Interstate and Foreign Commerce, 94 Cong., 2d Sess. (1976)	8
OTHER AUTHORITIES:	
A.B.A. Sec. Antitrust Law, *Antitrust Law Developments* (1975)	8
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P. Areeda & D. Turner, *Antitrust Law* (1978)	15
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P. Levine, *Attempt to Monopolize under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 Colum. L. Rev. 1451 (1973). 15

C. McCormick, *Damages* (1935) 16

Restatement (Second) of Torts (1979) 16

N. Smith, *Attempt to Monopolize: Its Elements and Their Definition*, 27 Geo. Wash. L. Rev. 227 (1958) 15

L. Sullivan, *Handbook of the Law of Antitrust* (1977) 8

Television Digest, Inc., *Television Factbook* (50 ed. 1981-82) 9

U.S. Department of Commerce, Bureau of Industrial Economics, *Franchising in the Economy 1980-1982* (1982) 8

J. Von Kalinowski, *Antitrust Laws and Trade Regulation* (1982) 14,15

"Rights Wars Are Growing in Cable TV," *Wall St. J.*, Aug. 25, 1982, at 21, col. 3 9

"K.B. MacArthur Closes; Lease Goes to Circle Theatre Corp.," *Washington Post*, Aug. 26, 1982, at D-4, col. 2 8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Twin City Sportservice, Inc., prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on May 10, 1982.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, reported at 676 F.2d 1291, is reproduced in Appendix A, *infra*, pp. 1a-42a. The District Court's Memorandum and Order dated December 29, 1978 is unreported and is reproduced in Appendix B, *infra*, pp. 43a-59a. The District Court's Memorandum and Order dated March 31, 1977 is unreported and is reproduced in Appendix C, *infra*, pp. 60a-76a. The Ninth Circuit opinion dated February 21, 1975 is reported at 512 F.2d 1264 and reproduced in Appendix D, *infra*, pp. 77a-93a. The District Court's opinion dated October 17, 1972 is reported at 365 F. Supp. 235 and is reproduced in Appendix E, *infra*, pp. 94a-128a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1982. On July 19, 1982, Mr. Justice Rehnquist extended the time within which to file a petition for writ of certiorari to and including September 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15. These statutory provisions are set forth in Appendices F, G, and H respectively, *infra*, pp. 129a-131a.

STATEMENT

This case began in 1967. Fifteen years later, it has now been the subject of two district court trials and two appeals before the Ninth Circuit. The net effect to date is that the owners of the Oakland (*nee* Philadelphia and later Kansas City) Athletics baseball club have been able to sell their concession rights twice and collect treble damages to boot.

The antitrust claims have been based on asserted foreclosure of competition in the market for the purchase of concession franchises, i.e., the market in which concessionaires purchase the right to operate concessions at facilities or events. 676 F.2d at 1304; App. A at 18a. The basic facts which made up this "restraint of trade" are simple. In 1950, the owners of the Athletics sold the team's concession rights to the petitioner, Twin City Sportservice ("Sportservice"), for 15 years in exchange for cash, credit and an agreement to pay 29 percent of the gross receipts from concession items sold by Sportservice. 512 F.2d at 1268-69; App. D at 78a. In 1952 and again in 1954, the team's owners amended the contract to extend its term (first to 1975 and then to 1983) and to add a follow-the-

franchise clause[1] in return for loans and other valuable consideration from Sportservice. 512 F.2d at 1269; App. D at 79a. There has never been any contention that the consideration for the franchise and extensions was inadequate.[2]

When Charles O. Finley & Co. ("Finley") bought the Athletics in 1961, Finley's purchase was necessarily subject to the then outstanding Sportservice contract, and the Athletics' purchase price presumably reflected this prior sale of concession rights. In 1967 Finley moved the team to Oakland, California, unilaterally broke its contract with Sportservice, and entered into a new contract with the concessionaire who was then operating at the Oakland Stadium. 512 F.2d at 1269; App. D at 79a. Sportservice sued for breach of contract; Finley counterclaimed alleging the contract violated the Sherman Act. Finley's contention was, in effect, that the outstanding contract with Sportservice operated as a restraint of trade because it prevented Finley from making a new contract with Sportservice or some other concessionaire.

In 1970, the district court upheld Sportservice's contract claims, but withheld judgment pending resolution of Finley's antitrust claims. 365 F. Supp. at 238; App. E at 96a. In 1972, Finley's antitrust claims were upheld, but in 1975 that decision was unanimously reversed and remanded by the court of appeals. 512 F.2d 1264; App. D at 77a. In 1978, the district court upheld Finley's antitrust claims again.[3] Finally, on May

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[1] The follow-the-franchise clause provided that, should the Athletics move to another city (as they had done once before, moving to Kansas City from Philadelphia in 1954), the concession franchise would nonetheless remain in effect.

[2] On the contrary, the essence of the violation alleged by the Athletics against Sportservice is that the latter paid too much for its concession contracts, and was thus able to obtain unreasonably long terms. *See discussion at pp. 4-5, infra.*

[3] Initially the district court identified the relevant market as the market for concession services, i.e., sales of concession items to the public. The court of appeals then redefined the market as the sale of concession rights to concessionaires. On remand, the district court relied on the testimony of Sportservice's successor with the Athletics to define the market as the 118 franchise opportunities most attractive to large national concessionaires. Sportservice's "market share" was based on its share of revenues derived

(Footnote continues)

10, 1982, fifteen years after the contract breach, the Ninth Circuit affirmed the district court's opinion on the merits, and also awarded interest from the date of the original damage award (1972). 676 F.2d at 1316-17; App. A at 41a.

The court of appeals found that the arrangement between Sportservice and the Athletics was an unreasonable restraint of trade and an attempt to monopolize. It reasoned that Sportservice's exclusive contract put its share of the market "beyond the grasp" of Sportservice's competitors. 676 F.2d at 1304; App. A at 18a. In so doing, the court of appeals (aggregating the franchises of Sportservice and all of its affiliates) referred to all the factors relied upon by the district court in holding Sportservice's bargain illegal—its "market share" of the franchises in the relevant market,[4] the long terms of its franchises, the loans at interest rates below market and advances paid for the long terms, and the follow-the-franchise clauses—as cumulatively supporting its holding that the franchise contract here was an unreasonable restraint of trade. The attempt to monopolize finding flowed directly from the finding of restraint of trade because, under the Ninth Circuit rule, Sportservice's conduct was exclusionary and therefore a sufficient basis for inferring

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(footnote continued)

from its franchises in this group, but major league baseball franchise revenues were doubled, presumably because baseball franchises were considered the most attractive. In the final appeal this market definition and methodology and these market share calculations were affirmed.

[4] The relevance of the market shares used is open to serious doubt for several reasons: (1) the "market" excluded an extremely large number of franchises which national concessionaires held and competed for, but which were in the court's view too small to be significant competitive opportunities, App. C at 69a-73a; (2) the calculation of Sportservice's market share was based on a double counting of baseball revenues, although the peculiar importance of baseball revenues to potential market power was unexplained, App. C at 74a; (3) as this Court made clear in *United States v. General Dynamics Corp.*, 415 U.S. 486 and *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 660, past market share is not determinative of the competition for "future increments of demand" in a bidders market like this one, and the number of franchises which have already been sold does not determine the level and intensity of competition for remaining franchises; and (4) Sportservice's market share, however measured, was declining throughout the period covered by the contracts. 365 F. Supp. at 239; App. E at 98a; Pl. Exs. 814, 609-11, 821-22, 827.

both that Sportservice had a specific intent to monopolize and that there was a dangerous probability of success.

The net effect of the lower court proceedings is that Finley's breach of contract has now been ratified by the courts, and Sportservice has been found liable for what may turn out to be millions of dollars in damages, interest, and attorney's fees.

REASONS FOR GRANTING THE WRIT

The antitrust laws are meant to promote and protect the forces of competition—to let parties make their own bargains based on the competitive variables of price, quality, and service, unaffected by collusion or undue market power. Here, this principle has been turned inside out. Without raising any legitimate antitrust issues, Finley has used the antitrust laws to release itself from its freely bargained contractual obligation.

Finley has also succeeded in establishing a legal standard that is actually anticompetitive. Viewed most favorably, the claim is that, in the wisdom of hindsight, it is *possible* that Finley would have been better off with a shorter contract and less compensation from Sportservice. By upholding that claim, the decision below in effect prohibits parties such as Sportservice from offering additional consideration in return for a longer contract, and other buyers and sellers are deterred from negotiating longer terms. Finley, however, has it both ways. Finley is allowed to keep the additional consideration Sportservice gave for the longer term, and to resell a second time the additional term of years Sportservice paid for. Even more bizarre, Finley collects treble damages for its "injury," i.e., agreeing to a long term contract and being paid too much.

Intervention by this Court is necessary to enforce and clarify the principle that a party seeking to upset his bargain—including a bargain structured as an exclusive franchise relationship—must demonstrate more than the availability of a better bargain; he must demonstrate that he was harmed by a practice which has or had an adverse impact on effective competition. By equating past franchise sales with market "foreclosure" without such a showing, the court below opened all long-term arrangements to antitrust attack. The result is

unnecessary uncertainty, risk, and cost for a significant body of commercial transactions.

1. By Refusing To Take The Approach This Court Directed In *Tampa Electric*, The Decision Below Unsettles The Legality Of Long-Term Exclusive Arrangements And Creates A Conflict In Approach Among The Circuits.

There is no restraint of trade under the Rule of Reason unless there is an impact on effective competition. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, established that this basic principle applies to long-term exclusive arrangements between buyers and sellers. The court below misapplied *Tampa Electric* and impaired the principle it stands for by ignoring the impact on effective competition and applying a merely mechanical analysis: Sportservice bought a substantial number of franchises; its competitors could not buy those franchises; therefore, competition to buy them was foreclosed.[5]

Thus, the impact found below was actually an impact on competitors. But all successful competition on the merits has the same sort of impact on unsuccessful competitors. The antitrust laws "were enacted for 'the protection of *competition*, not *competitors*,' *Brown Shoe Co. v. United States*, 370 U.S. at 320." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488. An impact on competitors, or a restriction on the

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[5] Although *Tampa* directed attention to the particulars of the marketplace and the specific ways in which competition was adversely affected, the court of appeals below rejected out of hand petitioner's showing that there had been no anticompetitive impact. No court below ever examined the record relating to:

(1) the number of potential bidders for franchises and whether that number was changed, or affected at all, by the challenged contracts;

(2) the level and vigor of competition for concession franchises—either before, during, or after the existence of the Sportservice contracts; or

(3) whether, as a result of the challenged conduct, there was any effect on the "price, quality, and quantity" of the bids received by concession franchisors.

Without examination of these factors, there can be no principled finding of any impact on competition.

autonomy of one party to a contract, has no impact on competition if it does not otherwise affect the " 'price, quality, and quantity of goods and services.' " *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 at 53 n.21.[6] Where the antitrust laws are applied mechanically without such a showing, the ironic effect is an artificial constraint on a seller's discretion to sell what he wishes, on a buyer's ability to compete with other buyers, and inevitably on competition generally. *Cf. United States v. Colgate & Co.*, 250 U.S. 300.[7]

Following *Tampa Electric*, other circuits have recognized that merely showing the portion of a market covered by exclusive arrangements does not demonstrate what impact, if any, those arrangements might have on competition. *See, e.g., Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975); *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74 (6th

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[6] Judge Posner has succinctly stated the issue ignored below in addressing a situation where a supplier of product liability insurance dropped one distributor in favor of another:

> Now, there is a sense in which eliminating even a single competitor reduces competition. But it is not the sense that is relevant in deciding where the antitrust laws have been violated. Those laws, we have been told by the Supreme Court repeatedly in recent years, are designed to protect the consumer interest in competition. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). The consumer does not care how many sellers of a particular good or service there are; he cares only that there be enough to assure him a competitive price and quality . . . . No inference could be drawn that the result of excluding [the complaining competitor] under such circumstances would be to raise the price, or diminish the quality, of product liability insurance to the ladder industry.

Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Co., 1982-2 Trade Cas. (CCH) ¶ 64,813 at 72,026 (7th Cir. 1982).

[7] This Court made it clear in *Colgate* that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long-recognized right of a trader . . . to freely exercise his own independent discretion as to parties with whom he will deal." 250 U.S. at 307. The decision below would apply a mechanical standard—originally developed to prohibit restraints on sellers—to limit the ability of those same sellers to determine the scope and shape of what they sell.

Cir. 1981); *Magnus Petroleum Co. v. Skelly Oil Co.*, 599 F.2d 196 (7th Cir.), *cert. denied*, 444 U.S. 916 (1979). Unless more is required, the public is "depriv[ed] . . . of the advantages of exclusive dealing contracts over alternative arrangements" because exclusive arrangements carry a legal risk unrelated to their impact on the public interest in competition. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1252 n.75 (3d Cir. 1975). Nonetheless, confusion persists about what is required of a plaintiff alleging anticompetitive foreclosure. Despite *Tampa Electric*, the decision below illustrates the need for additional guidance because this Court "has failed to reconcile" the quantitative approach based on market share with the qualitative approach based upon the actual impact on effective competition, *Dillon Materials Handling, Inc. v. Albion Industries*, 567 F.2d 1299, 1305 n.19 (5th Cir.), *cert. denied*, 439 U.S. 832 (1978), and the circuit courts have been unable to do so.[8]

The practical reach of the decision below goes far beyond sports concessions. The features of Sportservice's activities which the court of appeals identified as being suspect are common, legitimate business practices.

For example, the aspect of Sportservice's contract the Ninth Circuit found especially suspect was its duration. Yet long terms are commonplace in real estate leases[9] and franchises. In fact, a recent report by the Department of Commerce shows that more than 43 percent of all business franchise agreements are for 20 years or longer,[10] and exclusive dealing

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[8] The confusion in the case law is likewise reflected in uncertainty among the commentators and in the antitrust bar. *See* L. Sullivan, *Handbook of the Law of Antitrust* (1977) at 479; A.B.A. Sec. Antitrust Law, *Antitrust Law Developments* 44 (1975).

[9] *See, e.g.*, "K.B. MacArthur Closes; Lease Goes to Circle Theatre Corp.," *Washington Post*, Aug. 26, 1982, at D-4, col. 2 (theatre lease "in excess of 25 years").

[10] U.S. Department of Commerce, Bureau of Industrial Economics, *Franchising in the Economy 1980-1982*, at 10 (1982). Interestingly, almost 20 percent of the franchise agreements are perpetual. *Id. See also* Franchising Practices Reform Act of 1976, *Panel Discussion on H.R. 8349 Before the Subcomm. of the House of Rep. Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 297-98, 301, 306 (1976) (Statement of Norman D. Axelrod, Vice President Public Affairs, McDonald's Corporation) (20-year terms for McDonald's franchises are common).

agreements containing such long terms have commonly been upheld by the courts.[11] The long terms of the franchises normally granted in the cable television field were brought to this Court's attention early last term in *City of Boulder*;[12] terms substantially in excess of those at issue here are commonplace.[13] Similarly, the United States government grants national park concessions for terms of up to 30 years.[14] If the decision below is allowed to stand, all these agreements—as well as all leases and similar agreements with terms which a subsequent court may find to be excessive—will be placed in jeopardy.

The other factors here which were stigmatized by the courts below are likewise legitimate and widespread. The accumulation of franchises, as well as the accumulation of other separate productive assets like distributorships and patents, has commonly been upheld by the courts;[15] paying more money for

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[11] *See, e.g., New York Automatic Canteen Corp. v. Automatic Canteen Co. of America*, 1963 Trade Cas. (CCH) ¶ 70,625 (S.D.N.Y. 1962); *Engbrecht v. Dairy Queen Co.*, 203 F. Supp. 714 (D. Kan. 1962); *Illinois v. Convenient Food Mart, Inc.*, 21 Ill. App. 3d 97, 315 N.E.2d 124 (Ill. App. 1974). *See also Beemer v. Solar Oil Co.*, 96 N.J. Super. 50, 232 A.2d 447 (N.J. Super. 1967). Indeed, a 20-year Sportservice race track concession contract was upheld by a state court against antitrust challenge almost ten years ago. *See Maywood Sportservice, Inc. v. Maywood Park Trotting Ass'n*, 14 Ill. App. 3d 141, 302 N.E.2d 79 (Ill. App. 1973).

[12] *Community Communications Co. v. City of Boulder*, 102 S. Ct. 382.

[13] *See generally* Television Digest, Inc., *Television Factbook*, 583-a—1287-a (50 ed. 1981-82). *See also* " Rights Wars Are Growing in Cable TV," *Wall St. J.*, Aug. 25, 1982, at 21, col. 3. *See also* 47 C.F.R. § 76.31 (1982).

[14] *See* 16 U.S.C. § 3 (1976); U.S. Dept. of the Interior, National Park Service, "General Information Concerning the Granting of Concessions in the Areas Administered by the National Park Service" (undated).

[15] *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36; *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975); *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 834; *Bayou Bottling, Inc. v. Dr. Pepper Co.*, No. 790253, slip op. (W.D. La. July 15, 1982); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1715 (1982); *Lawlor v. National Screen Service Corp.*, 270 F.2d 146 (3d Cir. 1959). As *Fleer Corp.* and *Lawlor* make clear, the accumulation of franchises alone, like the mere accumulation of

(footnote continues)

an asset is merely price competition on the merits;[16] and coming to an agreement for a longer franchise rather than a shorter one is indistinguishable from patent or other licensing arrangements where the patentee, in the light of the offers available to him, makes a decision to license all or part of what he owns based on his judgment of his best interest.[17] There is simply no feature of the contract or the market at issue here which should justify the court's decision to remake the parties' bargain.

In sum, therefore, the Ninth Circuit court decision creates three types of harm by identifying useful, unobjectionable, and widespread business practices as the predicate for treble damages. *First*, it may mislead other courts into the same mechanical method of applying the Rule of Reason. *Second*, it may deter economically useful conduct merely because of the form of the arrangement; as *American Motor Inns* pointed out, *Tampa Electric* was calculated to avoid this result. 521 F.2d at 1251 n.75. And *third*, private litigants and people with "bad bargains" can presumably seize any of these "tainted" features to plead and prosecute an antitrust claim. Based on the decision below, the range of private contracts and arrangements vulnerable to antitrust claims is greatly widened. Only review by this Court can avoid the potential social cost of legal confusion, foregone business arrangements, and increased litigation.

(footnote continued)

patents or other assets, is not anticompetitive where, as here, there is no independent showing of market power, the franchises do not compete with each other, and the franchisors have effective competition available.

[16] The treatment of this issue by the courts below is in direct conflict with this Court's reasoning in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610. *Fortner* made it clear that more must be shown than that the defendant had a "deep pocket"; the defendant must possess a unique ability to offer cash and credit, such that a court could properly infer economic power in the credit market. In this case, as in *Fortner*, there was nothing to indicate that the loans and cash advances were anything more than the type of vigorous price competition the antitrust laws were intended to promote.

[17] *See General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, *aff'd on rehearing*, 305 U.S. 124 (a patentee may subdivide fields of use, reserving exploitation of one or more aspects of its patent rights to itself); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 135 (a patentee may "assign to another his patent, in whole or in part, and may license others to practice his invention.")

2. The Attempt To Monopolize Standards Employed By The Ninth Circuit Are In Conflict With Decisions Of This Court And All Other Circuits, And Yield Conclusions Contrary To The Facts.

The Ninth Circuit has long persisted in a singular approach to the "attempt" offense which is in conflict with the decisions of this Court and all other circuit courts of appeals. In this case, the Ninth Circuit found that a dangerous probability of monopolization could be inferred from Sportservice's conduct alone, even though its market share was declining.[18] In *ITT Continental Baking Co. v. William Inglis & Sons Baking Co.*, 668 F.2d 1014 (9th Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3936 (U.S. May 11, 1982) (No. 81-2083), the Ninth Circuit made a similar inference where the defendant had a static 22 percent market share and the dominant firm had increased its market share from 41 to 52 percent. Such inferences contrary to the facts would be impossible anywhere but in the Ninth Circuit. The frequency with which attempt claims are brought in the Ninth Circuit demonstrates the impact of the conflict and emphasizes the need for this Court to reestablish the proper standard.[19]

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[18] *See* n.4, *supra*. As Sportservice's market share has declined, the number of competitors (Pl. Exs. 131, 309, 318, 455, 488, 493, 514, 522, 552) and the number of concession franchises available for competition (D. Exs. 131, 132) have increased dramatically. Although this factual material was emphasized and pressed by Sportservice below, neither court below actually faced or dealt with it.

[19] As noted in the *ITT Continental Baking Co. v. William Inglis & Sons Baking Co.*, petition for writ of certiorari, at 14 n.25, the Ninth Circuit's rule may well account for the unusually heavy private antitrust docket in that circuit:

> In fiscal year 1981 more antitrust appeals were taken to the Ninth Circuit than to any other circuit—135 of 391, or 35 per cent of all such appeals. The figure for the Ninth Circuit exceeded the cumulative total of the next three circuits. Annual Report of the Director of the Administrative Office of the United States Courts —1981, Table B7, at A-12 (prelim. ed. 1981). As Professor Handler has noted, the Ninth Circuit, by eliminating the dangerous probability element of Section 2 and thereby "encourag[ing] a greater number of . . . suits where evidence of market

(footnote continues)

The nature of the conflict may be simply stated. The decisions of this Court have shown that there are three essential elements for a finding of attempt to monopolize under Section 2 of the Sherman Act: (1) specific intent to monopolize; (2) predatory or anticompetitive conduct directed toward that end; and (3) a dangerous probability of monopolization. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172; *American Tobacco Co. v. United States*, 328 U.S. 781; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594; *Lorain Journal Co. v. United States*, 342 U.S. 143; *Swift & Co. v. United States*, 196 U.S. 375.[20] Every circuit except the Ninth has followed this Court in requiring proof of each of these three elements before sustaining a finding of attempt to monopolize.[21] Only the Ninth Circuit has allowed all the

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(footnote continued)

power is all but nonexistent . . . has written over thirty opinions on this one topic since . . . [1964], or more than one third of all the appeals reported on attempted monopolization during that time in all the circuit courts." Handler & Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. Pa. L. Rev. 125, 174 (1980).

[20] In *Swift & Co. v. United States*, Justice Holmes said that:

> [w]here acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to . . . bring that result to pass, an *intent* to bring it to pass is necessary in order to produce a *dangerous probability* that it will happen. *Com. v. Peaslee*, 177 Massachusetts 267, 272 . . . [w]hen that intent and the consequent dangerous probability exist, [the Sherman Act], like many others and like the common law in some cases, directs itself against that dangerous probability . . . .
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> . . . .
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> . . . Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree.

196 U.S. at 396, 402 (emphasis added).

[21] *See, e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980); *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *White Bag Co. v. Inter-*

(footnote continues)

elements of an attempt to monopolize to be inferred from conduct alone—in this case conduct which was clearly competitive.

The general rule has a sound basis in the purposes of the antitrust laws. To avoid "the distinct possibility of over-deterrence [of] salutary and procompetitive conduct," *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-41, this Court and all circuits except the Ninth have required a showing of both a specific intent to monopolize,[22] and a dangerous probability that a monopoly will be achieved,[23] before punishing unilateral competitive conduct.

(footnote continued)

national Paper Co., 579 F.2d 1384 (4th Cir. 1974); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1277 (1982); *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *Oetiker v. Jurid Werke, G.m.b.H.*, 556 F.2d 1 (D.C. Cir. 1977).

[22] *See, e.g., Times-Picayune Publishing Co. v. United States*, 345 U.S. 594; *Bowen v. New York News, Inc.*, 366 F. Supp. 651 (S.D.N.Y. 1973), *aff'd in part, rev'd in part on other grounds*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976) (intent not inferred from predatory practices not designed to eliminate competition); *Northwest Controls, Inc. v. Outboard Marine Corp.*, 333 F. Supp. 493 (D. Del. 1971) (specific intent not inferred from price manipulation held to be good faith business effort to meet competition); *Telex Corp. v. I.B.M. Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) (specific intent not inferred from price cuts justified by legitimate business economics); *American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963) (neither rough competition nor unethical business conduct sufficient to infer specific intent to monopolize; the requisite intent must be present and predominant).

[23] *See, e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (no dangerous probability of monopolization where elimination of the plaintiff would only have raised defendant's market share from 2.7 to 3 percent); *Nifty Foods Corp. v. Great Atlantic and Pacific Tea Co.*, 614 F.2d 832 (market share which declined from 54.5 percent to 33 percent was inconsistent with a dangerous probability of monopolization); *White Bag Co. v. International Paper Co.*, 579 F.2d 1384 (market share insufficient to prove a dangerous probability of monopolization); *Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094

(footnote continues)

Only the Ninth Circuit adheres to the view that neither proof of a relevant market nor the defendent's power in that market is essential to analysis of the attempt offense. *See Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978) *and cases cited therein; California Steel and Tube v. Kaiser Steel Corp.*, 650 F.2d 1001 (9th Cir. 1981); *A.H. Cox & Co. v. Star Machinery Co.*, 653 F.2d 1302 (9th Cir. 1981); *ITT Continental Baking Co.*, 668 F.2d 1014. Thus, as the court of appeals noted below, "an attempted monopoly violation can be found with evidence of conduct alone" and this conduct may be merely "conduct forming the basis for a substantial claim of restraint of trade." 676 F.2d at 1309; App. A at 26a.

This approach is clearly unsound. Elimination of the element of a "dangerous probability" from the offense of attempted monopolization leaves "virtually no perimeters on the prohibitions of Section 2" J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.01[2] n.32 (1982). Moreover,

> [i]t does not seem possible in any rational scheme to avoid entirely the question of the degree of power. In assessing restrictive business conduct that is at the same time ancillary to competition on the merits, the degree of market power seems inescapably relevant.

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(1977) (20 percent share of the relevant market insufficient to prove a dangerous probability of monopolization); *Mowery v. Standard Oil Co.*, 463 F. Supp. 762 (N.D. Ohio 1976), *aff'd*, 590 F.2d 335 (6th Cir. 1978) (verdict directed in favor of defendant because plaintiff failed to produce any evidence of market structure, and therefore did not establish a dangerous probability of monopolization); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (no dangerous probability of monopolization where defendant's market shares in the relevant markets declined from 33 percent to 24 percent, 22.5 percent to 7.4 percent, and 31 percent to 16 percent); *United States v. Empire Gas Corp.*, 537 F.2d 296 (proof of 50 percent market share alone not sufficient to show a dangerous probability of monopolization); *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) (failure to provide market data or prove "economic power" in the market); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F. Supp. 263 (D.D.C. 1976), *aff'd on other grounds*, 569 F.2d 666 (D.C. Cir. 1977) (no dangerous probability of monopolization where two competitors held larger shares of the market than the defendant.)

P. Areeda & D. Turner, *Antitrust Law*, at ¶¶ 831, 833d (1978). *See also* N. Smith, *Attempt to Monopolize: Its Elements and Their Definition*, 27 Geo. Wash. L. Rev. 227, 235 (1958). This case illustrates the point. No court below ever examined the state of competition in the relevant concession-franchise market and the "exclusionary" conduct shown here was nothing more than successfully bidding for a franchise. There was never any realistic possibility of monopoly in any relevant market.[24]

Section 2 is not and should not be "a general statutory prohibition of unfair competition,"[25] but this is essentially the impact of the Ninth Circuit rule. As demonstrated here, this rule allows a court to decide without an intelligible basis that past conduct was "unfair" and "therefore" that it was an attempt to monopolize, without ever linking the "unfairness" to any risk of monopoly power, and without ever considering evidence that there was no link. Thus every "bad bargain" becomes an opportunity to collect treble damages. *See* Von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.01[2] n.32 (1982). This Court should take this occasion to bring the legal standards of the Ninth Circuit into conformity with those of all other circuits.

3. The Award Of Automatic Damages Without Any Showing Of Antitrust Injury Is Inconsistent With Prior Decisions Of This Court.

The decision below awards damages on two assumptions: *first*, the assumption that Finley was damaged; and *second*, a further assumption that the damage was a result of the restraint it found. It is the prospect of just such windfall recoveries as this which swell the ranks of antitrust plaintiffs, distort the defense of antitrust claims, and penalize competitive conduct without justification. Review by this Court is necessary to reassert the proper bounds of antitrust recovery, and remove

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[24] *See* n.18, *supra*.

[25] P. Levine, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 Colum. L. Rev. 1451, 1467 (1973); *see also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512; *Hunt v. Crumboch*, 325 U.S. 821; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594; *Lorain Journal Co. v. United States*, 342 U.S. 143.

the "lottery" incentive for making antitrust claims in the absence of actual competitive injury.

a. Finley never established either the fact or the amount of any injury.

Recovery under Section 4 of the Clayton Act requires a showing of injury in fact. As this Court has recently stated, Section 4 "focuses on tangible economic injury." *Blue Shield of Virginia v. McCready*, 102 S. Ct. 2540. The treble damage remedy is an integral part of the antitrust enforcement process, but "the potency of the remedy implies the need for some care in its application." 102 S. Ct. at 2548. The courts below instead awarded damages to Finley based merely on the finding of a violation, without any examination of whether Finley had in fact been injured. This presumption of injury conflicts with this Court's rejection of arguments that the finding of an antitrust violation automatically "gives rise" to a treble damage claim. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562.

The facts here offer a particularly striking illustration of the "automatic damages" problem addressed in *J. Truett Payne*. The primary purpose of any damage recovery is compensation — putting the plaintiff in the same position as it would have been in absent the defendant's wrong-doing. C. McCormick, *Damages* 560 (1935); A. Corbin, *Contracts* § 992 (1964); *Restatement (Second) of Torts* § 901 (1979). Because Section 4 of the Clayton Act "is essentially a remedial statute," damages must be measured by a realistic appraisal of "what plaintiff's situation would have been in the absence of the defendant's antitrust violations." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 566.

Finley's notion of antitrust injury cannot be reconciled with its theory of liability: Finley has never attempted to show how or why it would have been better off financially if there had been no violation—that is, on its theory, if there had been no offer of additional consideration for a longer term.

The measure of damages adopted below does not face this issue at all. The courts below measured Finley's "injury" by comparing the percentage of revenues paid by Sportservice to

Finley with the percentage of revenues paid to the successor Kansas City baseball team by its franchisee. First, the comparison is between franchises awarded by different clubs at different times for different places without taking into account any of those factors. Second, and most importantly, the comparison measures only *part* of the consideration paid by Sportservice against *all* of the consideration paid by the other concessionaire. No effect was given to the prepayments — in the form of low interest rate loan and payment advances or both — made by Sportservice; nor was the critical issue of what the Athletics would have been paid by Sportservice if there had been no "violation" ever addressed.

While this point is not articulated by the courts below, it may be that the prepayments made by Sportservice were ignored because they were mistakenly viewed as improper. But proper or not — and as the discussion above makes clear, they were merely price competition on the merits — they are necessarily relevant to a calculation of the actual damages suffered by Finley. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140; *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). Proper damages analysis in an antitrust case, must take account of *all* the elements of price. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648-49; *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 618.[26] It is necessary to "offset injuries which the plaintiffs may have suffered at the

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[26] A similar issue is now before this Court in *Weyerhaeuser Co. v. Lyman Lamb Co.*, 655 F.2d 627 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3743 (U.S. Mar 2, 1982) (No. 81-1618). In that case, one of the questions presented by the petitioner is the following:

> Can the measure of damages in cases involving the alleged fixing of only one element of price be based solely on that single element, or must it reflect the challenged conduct's effect on the total price paid by the buyer?

If the second part of this question is answered in the affirmative in *Weyerhaeuser*, the present case would also have to be reversed and remanded for recalculation of damages. Whatever the result in *Weyerhaeuser*, however, this case is clearly inconsistent with the holding in *J. Truett Payne* and thus must be reversed for that reason alone.

hands of the defendants with benefits which they have derived from the very activities they attack." P. Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127 (1976), *cited with approval in Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 487 n.11.

b. Any "injury" suffered by Finley was not "antitrust injury" as required by *Brunswick v. Pueblo Bowl-O-Mat.*

A pattern of "predatory purchasing" was Finley's theory of violation. The general length of Sportservice's contracts, it was argued, was the result of "lavish" loans and "pay-offs" to the franchise sellers. Finley was supposedly hurt because, as a result of length of its contract, it was not able to sell the franchise rights again when it wanted to. But assuming an arms-length bargain in the first place—a point never disputed by Finley—Finley could logically suffer antitrust injury *only* if competition for the original term of sale was affected by the challenged conduct. Not only was no evidence offered on this point, but Finley's own theory of liability—that the price paid by Sportservice was higher by virtue of the loans and advances which were part of the allegedly anticompetitive scheme—is flatly inconsistent with any notion of "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489.

Indeed, as was also true in *Brunswick*, " [i]t is inimical to the purpose of the antitrust laws to award damages for the type of injury claimed here." 429 U.S. at 488. Finley after all, is neither a coerced seller (compare *Perma Life*, 392 U.S. 134) nor a foreclosed buyer. Stripped to its essentials, Finley's complaint is that the contractual obligations that it undertook when it purchased the Athletics limited its eventual profit opportunities, and thus it made less money than it would have made if it had not taken on those contractual obligations. Finley seeks to recoup this "loss" by arguing not that competition was injured in some way by the arrangement between Sportservice and the Athletics, but that Sportservice's competitors were somehow restrained. Because of that "violation,"

Finley argues, *it* is entitled to ignore *its* contract, and to be compensated as it *might have been* if the contract never existed.

As this Court noted in *Kelly v. Kosuga*, 358 U.S. 516, however, "[a]s a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court." 358 U.S. at 518. Any other rule would violate this "overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" [citation omitted]. 358 U.S. at 520.

What Finley seeks to recover here is nothing more than a windfall: it seeks to retain the benefits of Sportservice's alleged "overpayments," use the fact of those "overpayments" to break the contract to take advantage of what it now perceives to be a better bargain, and collect treble "damages" as well. This Court should not permit this result to stand, for "the desire to encourage private enforcement and to penalize antitrust violations is no excuse for awarding damages that are nonexistent ...." P. Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127 (1976).

CONCLUSION

The decision below is in conflict with the decisions of this Court and of other circuits. The petition for certiorari should be granted.

Respectfully submitted,

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